Supreme Court, U.S.
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IN THE

United States Supreme Court

THOMAS HANNIGAN,

Petitioner,

v.

COMMISSIONER OF CORRECTIONAL SERVICES,
STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the petitioner was denied the effective assistance of counsel because his assigned attorney, Steven Walutis, was under investigation while representing him, but never informed Hannigan of any possible conflict of interest or other distraction that was obviously affecting him?

2) Whether the petitioner was denied the right to be present during all material stages of his trial because he was excluded from a significant portion of voir dire questioning of perspective jurors without his consent?

3) Did the Prosecutor's flagrant misconduct deny the petitioner his right to a fair trial by continuously and deliberately informing the jury that he was a habitual criminal, thus in violation of the trial Court's *Sandoval* ruling?

4) Was the petitioner's confession, which was obtained after being in police custody for many hours, without the presence or consultation of an attorney, properly admitted into evidence?

5) Was the photographic identification procedure employed by the police unfairly suggestive?

THE PARTIES

The parties are as listed in the caption.

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IN THE

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OPINIONS BELOW

Memorandum Order and Judgment of the United States District Court, Eastern District of New York dated August 7, 2003 appears at appendix A of this petition.

The Summary Order of the United States Court of Appeals for the Second Circuit dated April 5, 2004 appears at appendix B of this petition.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is predicated upon issues affecting the Due Process and Equal Protection Clauses of the, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Rules 10(c) and 13(3) of this Court's rules, etc.

A Summary Affirmance Order dated April 5, 2004 was issued by the United States Court of Appeals. (Rule 13(3)

of this Court's rules). The District Court granted a certificate of appealability as to the issues presented herein in a Memorandum Order and Judgment rendered in the United States District Court for the Eastern District of New York by the Honorable Jack Weinstein on August 7th, 2003 denying the Petitioner's Writ of Habeas Corpus.

An Emergency Extension of Time was granted by this Court to File this Petition on or before September 2, 2004 by Justice Ginsberg.

Notification required by Rule 29.4(c) has been made upon the Attorney General of the State of New York, and the Solicitor General of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Fourth, Fifth, Sixth and Fourteenth Amendments along with Due Process and Equal Protection Clauses thereof.

INTRODUCTION AND STATEMENT OF THE CASE

Thomas Hannigan petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals, for the Second Circuit, in this case.

While there are several important issues presented in this petition for Certiorari, one of the main issues is whether the Petitioner herein was denied effective assistance of counsel during his trial by his court appointed attorney, Steven Wilutis, who was himself under active investigation at the time of his trial.

The petitioner was convicted of one count of felony murder, one count of intentional murder, and one count of burglary, first degree, after a Jury trial before Honorable Michael F. Mullen, Justice of the Supreme Court, Suffolk County, on the 27th day of July, 1989. Pursuant to the judgment of conviction above he was sentenced to an effective term of 25 years to life, concurrently on the homicide counts to be followed by a sentence of 12 ½ - 25 years imprisonment on the burglary conviction. The petitioner is, of course, presently incarcerated.

In August 1992, petitioner appealed to the New York State Appellate Division, Second Department. Hannigan made the following arguments: (1) the trial court erred in not suppressing the confessions on Fourth and Fifth Amendment grounds; (2) the trial court erred in not suppressing the confessions on Sixth Amendment grounds; (3) the confessions should have been suppressed because they were involuntarily made; (4) the identification procedure was unduly suggestive; (5) Hannigan was denied a fair trial because of prosecutorial misconduct; and (6) the evidence did not establish appellant's guilt beyond a reasonable doubt.

On February 3, 1993, the petitioner filed a supplemental brief that contained a seventh claim—that the trial Court erred by screening potential jurors in the presence of petitioner's trial counsel but outside the presence of the petitioner and without petitioner having waived his appearance. The claim in the supplemental brief was based on *People v. Sloan*, 79 N.Y.2d 386 (N.Y. 1992), which was decided nearly three years after the petitioner's conviction. In *Sloan*, the Court of Appeals reversed a conviction where the defendant was excluded from a *voir dire* sidebar at

which the trial judge asked jurors about their attitudes and feelings concerning the events and witnesses involved in the case.

The New York State Appellate Division, Second Department examined claims concerning his exclusion from part of the *voir dire* in depth. *See People v. Hannigan*, 193 A.D. 2d 8, 601 N.Y.S. 2d 928 (N.Y. App. Div. 2d Dep't 1993). After considering *Sloan* and its progeny, the New York State Appellate Division held that this doctrine was not applicable retroactively. With regard to Hannigan's remaining contentions, the New York State Appellate Division held that they were "unpreserved for appellate review or without merit." *Hannigan,* 193 A.D. 2d at 14; 601 N.Y.S. 2d at 932. The petitioner sought and obtained permission to appeal solely on the *Sloan* question to the New York Court of Appeals. The New York Court of Appeals affirmed the decision of the New York State Appellate Division, Second Department without comment. *See People v. Hannigan*, 84 N.Y. 2d 981, 622 N.Y.S. 2d 905 (N.Y. 1994).

On August 17, 1998, Judith Smith was murdered in her West Islip home. The petitioner, who lived nearby, was immediately suspected by the police despite there being no particular reason to believe that he committed the crime. The day after the crime, the victim's car, which had been taken at the time of the murder, was recovered in New York City. A clerk, who worked in a store near where the car was found, recalled seeing the petitioner in the store that day after being shown Hannigan's picture by police. The petitioner's fingerprints were found inside the car and his palm print was found outside a window at the victim's home. A sneaker print was also found inside the victim's

house, however, the tread did not match any sneaker traced to the petitioner. No evidence from inside the decedent's home connected the petitioner to the crime.

In order to place Hannigan near the crime scene, the detectives assigned to the case interviewed local residents about the day of the murder. One of the individuals whom they interviewed was Walter Knoblich, an elementary school custodian. The detectives showed Mr. Knoblich one photograph of the appellant and asked him if he recognized the man in the picture. This is the same suggestive tactic that they employed with the store clerk in New York City. Similarly, like the store clerk from Manhattan, Mr. Knoblich claimed that he recognized the petitioner.

Although the police believed that they had probable cause to arrest the petitioner, they chose not to do so. Instead, they conducted a "stake-out" of his residence. The purpose of the "stakeout" was to arrest Hannigan when he was alone so that his friends and family would not call an attorney and therefore Hannigan could be interrogated. Hannigan, then only twenty-two years old, was arrested and taken to the police station. Upon arrival, he was placed in an eight-foot by nine-foot interrogation room with as many as four police officers. The interrogation of the petitioner began at approximately 8:00 p.m; Hannigan signed a confession at 10:48 p.m. The interrogation then continued until 1:30 a.m., when the petitioner called his parents. The petitioner then altered his confession, stating that he had acted with an accomplice. At approximately 4:00 a.m., Hannigan made a videotaped confession.

During the length of the interrogation, Hannigan complained of enduring tortuous treatment at the hands of the Homicide Detectives assigned to the case. The petitioner

not only suffered physical beatings, but the deprivation of food, water and the use of the facilities as well.

Hannigan was indicted on two counts of murder (intentional and depraved indifference murder) and one count of first degree burglary. The trial Court conducted a pre-trial hearing to determine whether police had probable cause to arrest Hannigan and whether the confessions and pre-trial identifications would be admissible at trial. In a written decision dated June 7, 1989, the Court held that the police did have probable cause, that the identifications were proper, that the confessions were not coerced, and his right to an attorney was not violated.

During the jury selection process, there were numerous voir dire conversations conducted among the prospective jurors, the trial Judge and the respective attorneys. Significantly, these interviews were conducted without the petitioner being present, and sometimes even without him being in the Courthouse. Importantly, Hannigan never waived his right to be present during any of these discussions. Eventually, one of those people interviewed became a sitting juror.

The petitioner was assigned Steven Wilutis, Esq. pursuant to section 18-b of the New York County law to represent him. During the entire time that Attorney Wilutis represented the petitioner, Wilutis was under an active investigation by a Special Prosecutor who was appointed by the State of New York. Significantly, the petitioner was never informed by Wilutis of this investigation. While ultimately Wilutis was never charged as a result of this investigation, a complaint to the New York Grievance Committee was filed. That complaint was ultimately dismissed in April 1990, well after the petitioner was convicted.

REASONS FOR GRANTING THE PETITION

POINT ONE

Petitioner was prejudiced because his assigned lawyer was himself under criminal investigation without Hannigan's knowledge.

The petitioner, Thomas Hannigan, was denied the effective assistance of counsel for several reasons. The most glaring aspect of this depravation of effective assistance of counsel, by his assigned lawyer Steven J. Wilutis, was that Mr. Wilutis was under active investigation by a Special Prosecutor during the time he was preparing for the trial of Mr. Hannigan, and during the trial itself. There is substantial case law indicating that an attorney, especially an assigned attorney, must promptly disclose any possible conflict of interest or other distraction that may be besetting that attorney. Upon such notification not only to the client, but to the Court, the case hold the Court must promptly hold a hearing wherein it advises the client, namely the petitioner herein, of this potential conflict of interest and must give the client an opportunity to decide whether he wants to continue with this attorney or elect to have another attorney represent him.

In the case of Steven J. Wilutis, the assigned § 18-b lawyer, Mr. Hannigan was totally unaware of the fact that Mr. Wilutis was under active investigation by a Special Prosecutor for the State of New York since he had been a former Assistant District Attorney for Suffolk County. It is not disputed that there was an active investigation of the Prosecutor's office and the police actually going on in Suffolk County during the time of this case, in which Mr. Wilutis was certainly a potential target. Furthermore, it is

not denied that Mr. Wilutis was interviewed by Special Prosecutor Pierre G. Lundberg.

Although, Mr. Wilutis was not formally charged in connection with the investigation, a complaint was later filed with the State of New York Grievance Committee of the Bar Association. This complaint was not dismissed until after the petitioner's conviction.

Although the complaint was ultimately dismissed, that does not mitigate the fact that Mr. Wilutis was under investigation and was undoubtedly preoccupied, very concerned, and distracted about his own vulnerability to possible prosecution. The petitioner was tried in the Supreme Court of Suffolk County in June of 1989 and throughout that representation by attorney Wilutis, the temporary commission of investigation was investigating the District Attorney's office, Suffolk County as well as the County Police Department. It was not until April 18, 1990 that the complaint against Mr. Wilutis was ultimately dismissed. The crucial fact is that no notification whatsoever was ever given to the petitioner herein and consequently he was deprived of the effective assistance of counsel as the cases clearly indicate.

This deprivation of the effective assistance of counsel not only impacts upon the Sixth Amendment Right to effective and adequate representation, but the failure to disclose these potential conflicts clearly impact as well upon the Fifth Amendment right and Fourteenth Amendment right to a fair trial.

The right to conflict-free counsel is an essential component of the Sixth Amendment right to effective assistance of counsel. In fact, the Court in *Hamilton v. Ford*, 969 F.

2d 1006, 1011 (11th Cir. 1992) has stated the following: "Part of effective assistance of counsel is the avoidance of conflicts of interest."

The Sixth Amendment right to effect assistance of counsel includes the right to counsel who is not "burdened by an actual conflict of interest." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Ordinarily, to establish ineffectiveness of counsel, an appellant must prove: (1) that his attorney's representation fell below an objective standard of reasonableness and (2) that he was prejudiced. *Id.* at 687, 104 S. Ct. 2064. Prejudice is established where the appellant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068.

A different standard is applied when the attorney's representation of multiple clients (in this case it is the appellant himself) has created an actual conflict of interest. In such a case, prejudice is presumed and the appellant need only show that the actual conflict adversely affected the performance of counsel. *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S. Ct. 1708, 1718, 64 L. Ed. 2d 333 (1980). As the Supreme Court recognized: "[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067. The reason for the lesser standard is that when counsel represents two clients with opposing interests, both clients cannot be served adequately. *Cuyler*, supra. The presumption of prejudice also applies when an accused is represented by counsel who, at the same time, is

being investigated by the Prosecution. *United States v. McLain*, 823 F. 2d 1457 (11th Cir. 1987).

The rationale for the application of the presumption is the same, i.e., counsel is simultaneously laboring under competing and inconsistent interests because he must serve as the Prosecutor's adversary for the benefit of the client while at the same time curry favor with the Prosecutor in the hope of obtaining a favorable resolution of the pending investigation against him. See also *United States v. Grieg*, 967 F. 2d 1018 (5th Cir. 1992); *Mannhalt v. Reed*, 847 F. 2d 576 (9th Cir. 1988); *Government of Virgin Islands v. Zepp*, 748 F. 2d 125, 136 (3d Cir. 1984); *United States v. Cancilla*, 725 F. 2d 867 (2d Cir. 1984) *United States v. White*, 706 F. 2d 506 (5th Cir. 1983); *United States v. Fulton*, 5 F. 3d 605 (2d Cir. 1993). When a Trial Court is sufficiently appraised of even the possibility of a conflict of interest, the Court has an obligation to conduct an inquiry of the accused. *Wood v. Georgia*, 450 U.S. 261, 272-273, 101 S. Ct. 1097, 1103-1104, 67 L. Ed. 2d 220 (1981); *Cuyler*, 446 U.S. at 347, 100 S. Ct. at 1717-18, 55 L. Ed. 2d 426 (1978). When a possible conflict has been entirely ignored, reversal is automatic. *Cuyler*, at 446 U.S. at 347, 100 S. Ct. at 1717-18; *Holloway v. Arkansas*, 435 U.S. at 488, 98 S. Ct. at 1180-81; *Hamilton v. Ford*, 969 F. 2d 1006, 1011-12 (11th Cir. 1992), *cert. denied*, 507 U.S. 1000, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993).

Now that petitioner is before the United States Supreme Court, we submit it is quite significant that there is substantial law that an actual conflict of interest requires reversal because of the fact that it *ipso facto* deprives the defendant of adequate representation by his lawyer. In the case of *United States v. Chaim Levy*, 25 F. 146 (2nd Cir.

1994), the United States Court of Appeals for the Second Circuit held that the defendant, Chaim Levy, was entitled to a new trial because of the fact that his trial lawyer, Ivan Fisher, was involved in an actual conflict of interest because of the fact that he himself was the subject of a federal investigation involving criminality.

As noted, in order to obtain relief, Hannigan need not show prejudice but need only show that Wilutis performance was adversely affected by the criminal investigation into the allegations against him. Such adverse affect has been found where, during his client's case, counsel "must have been plagued by the fear of sanctions" or the "uncertainty of whether he would be indicted". *Grieg*, 967 F. 2d at 1024. Adverse affect is also demonstrated by lapses in representation, such as counsel's failure to adequately prepare for the defendant's case, *Mannhalt v. Reed*, 847 F. 2d at 581, or "the failure of defense counsel to cross-examine a Prosecution witness whose testimony is material or the failure to resist the presentation of arguably inadmissible evidence. . ." *United States v. Tatum*, 943 F. 2d 370, 376 (4th Cir. 1991). "Likewise, a failure to act on behalf of a client before trial has representational significance." *Id.*

"Adverse affect" is also established where: (1) counsel failed to pursue a viable defense strategy or tactic that conflict-free counsel might have undertaken; (2) the strategy or tactic was reasonable under the facts; (3) there is some link between the actual conflict of interest and the alternative strategy. *United States v. Freund*, 165 F. 3d at 860. One of the chief evils resulting from an attorney's conflict of interest is what counsel refrains from doing to defend his client. *Holloway v. Arkansas*, 435 U.S. 475, 790, 98 S. Ct. 1173, 1181, 55 L. Ed. 2d 426 (1978).

Wilutis's lapses in representation meet the above tests for adverse affect. The trial record reveals that: *Wilutis failed to interview potential defense witnesses*, and vigorously and completely defend the appellant. Wilutis offered no witnesses on the appellant's behalf and failed to mount a defense case.

The proper standard for analysis of the conflict of interest issue is not whether defense counsel's actions or inactions constituted reasonable trial strategy. Rather, the correct standard is whether some plausible strategy or tactic might have been pursued, but was not, due to the conflict of interest. *United States v. Perillo*, 79 F. 3d at 450. "We must remember that under *Cuyler*, the issue is not what was the best strategy, but whether there was a plausible defense strategy that might have been pursued but was not, because of the conflict of interest. Similarly here, it is difficult to believe that by antagonizing and/or defeating the Prosecutor in the representation of Hannigan, Wilutis could not be helping his own cause. Wilutis's actions and inactions were attributable to his divided loyalty between himself and Hannigan. Thus, Hannigan sufficiently demonstrated that Wilutis's performance was adversely affected by the Prosecutor's investigation.

At the very least, the case should be remanded for an evidentiary hearing on the issue. *Cave v. Singletary*, 971 F. 2d at 1516; *Burden v. Zant*, 871 F. 2d 956 (11th Cir. 1989). See also *Huynh v. King*, 95 F. 3d 1052 (11th Cir. 1996).

It is undisputed that Hannigan was totally unaware of the fact that any investigation of Mr. Wilutis directly or indirectly existed. Yet, Mr. Wilutis in his letter to Attorney Anolik states that indeed there was an investigation and that he was interviewed by a Special Prosecutor and that a

complaint was also made before the Grievance Committee of the New York State Bar Association and that complaint was not dismissed until 1990, which certainly encompassed the period during which Mr. Wilutis was representing the petitioner at his trial. The deprivation of the effective assistance of counsel, free from any possible conflict involving himself or someone else, not only impacts upon the Sixth Amendment right to effective and adequate representation, but failure to disclose these potential conflicts clearly embraces a violation of the Fifth Amendment and Fourteenth Amendment of the U.S. Constitution and his right to a fair trial.

In *Wood v. Georgia,* supra, the court indicated that *Sullivan* mandates a reversal when the Trial Court has failed to make an inquiry even though:

> "It knows or reasonably should know that a particular conflict exists" (450 U.S. at 272 18 (quoting and citing *Kayla v. Sullivan*, 446 US at 347".)

The cases in the U.S. Supreme Court and in other courts as well clearly mandate that a full hearing be held when a judge knows or should have known about a conflict of interest and a conflict of interest clearly exists where an attorney is under inquiry or investigation during the pendency of his representation that could result in a possible charge or indictment against him.

POINT TWO

Petitioner's Due Process and Equal Protection Rights were violated by his exclusion from participating in the *voir dire* for selection of jurors.

During the jury selection process it was determined that a large number of the prospective jury pool were exposed to news reports concerning the petitioner's case. As a result, the trial Court instituted a screening process with individual jurors in chambers. The questioning of the prospective jurors exceeded the matters pertaining to the jurors' general qualifications and explored attitudes and feelings concerning some of the events and witness involved in the appellant's case. In essence what had taken place in chambers was the initial voir dire of prospective jurors without the petitioner being present. The petitioner never waived or otherwise permitted any questioning of potential jurors outside his presence. This deprived him of equal protection of the laws and of due process of law.

In relatively recent New York Court of Appeals cases, specifically *People v. Sloan*, 79 N.Y.2d 386 (1992) and *People v. Antommarchi*, 80 N.Y.2d 247 (1992), the New York Court of Appeals held that a defendant had an absolute right to be present at voir dire. The New York Court of Appeals based its decision on Federal Constitutional due process grounds. Initially, the New York Court of Appeals decided that its new decision would be applied retroactively to all cases pending on appeal on the date of that decision. Nevertheless, the petitioner's appeal to the Appellate Division Second Department affirmed his conviction on August 30, 1993, on the basis that the New York

Court of Appeals decision in *Sloan* and *Antommarchi* would be applied *prospectively only*.[1]

Presently there is no doubt that a criminal defendant is entitled to be present during the voir dire of prospective jurors unless there is a waiver. In the case at bar, no such waiver was ever given by the petitioner. An important issue to be resolved is whether the petitioner was denied equal protection under the U.S. Constitution by not being given the same federal constitutional due process rights as an individual who is tried after April 7, 1992, the date *People v. Sloan* was decided. It is not disputed that the petitioner had every right to be present during the in chambers voir dire of prospective jurors, it is only disputed whether he is entitled to the expanded protections that the New York Court of Appeals outlined in *Sloan* and *Antommarchi*.

One of the jurors who was questioned in chambers outside the presence of the petitioner became the foreperson of the jury. Therefore, this is not merely a moot point since an actual sitting juror was selected after undergoing voir dire outside the presence of the petitioner. Moreover, District Judge Weinstein inaccurately assumed that the petitioner was actually present in the courtroom during these interviews. It is our contention that some of these interviews were conducted when the petitioner was not even in the courthouse. While this is essentially a state law protection, it does have federal implications under Equal Protection of Fourteenth Amendment and this Court does have the requisite powers to address this issue. We believe that this issue encompasses due process and fundamental fairness and, therefore, under *Coleman v Thompson*, 501 U.S.

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[1] Court cannot legislate but by ruling it was prospective only, that is what it did!

922, 750 (1991), this court has the ability to properly review this issue.

POINT THREE

The Prosecutor's outrageous misconduct at trial violated Petitioner's due process right to a fair trial.

The Prosecutor intentionally engaged in such gross and flagrant misconduct that it denied the petitioner his right to a fundamentally fair trial. Prior to the commencement of the trial, both the Prosecutor and defense counsel agreed on a *People v. Sandoval*, 34 N.Y. 2d 371, 357 N.Y.S.2d 849 (1974) compromise, whereby, the People would be permitted to mention on their direct case that the petitioner had been convicted of a felony. This agreement was approved by the trial judge who specifically ruled that the Prosecutor would not be permitted to adduce that the petitioner was currently "on parole", nor was there to be any mention of past burglaries committed by the petitioner.

In a blatant disregard of the agreement between counsel and the directive of the Court, the Prosecutor, on his opening statement unfairly stated that the petitioner had committed "burglaries in the past". Moreover, during the Prosecutor's direct examination of several police witnesses, he adduced testimony concerning the petitioner's extensive past criminal record. This was a clear and flagrant violation of the Court's *Sandoval* ruling, which was agreed upon by attorneys for both parties and had the unfair impact of creating such prejudice among the jurors against the petitioner as to preclude a fair trial.

Furthermore, the Prosecutor mentioned that the petitioner sexually attacked the victim herein despite the fact the

petitioner was not charged with any crimes of a sexual nature. The only reason the Prosecutor had for injecting these inflammatory remarks was to unfairly prejudice the jury against the petitioner.

The Prosecutor's role differs from that of a lawyer representing a private client. He "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935). "He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States, supra,* 295 U.S. at 88. See also, Code of Professional Responsibility Sec 7-13; ABA Standards for Criminal Justice, standard 3-1.1.

Ordinarily, a Prosecutor's misconduct will require reversal of a state Court conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair and, therefore, a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Nonetheless, "when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair." *Mahorney v. Wallman*, 917 F. 2d 469, 472 (10th Cir. 1990) (citing *DeChristoforo*, 416 U.S. at 643). We believe in the instant case that the prosecutor's conduct was so egregious that the aforementioned criteria were easily met.

POINT FOUR

The confessions of Petitioner were inadmissible.

Among the most damning evidence adduced at trial against the petitioner was the introduction of allegedly voluntary written and video taped confessions to the crime. After a pre-trial hearing, the trial court judge decided that the above mentioned statements which inculpated the petitioner were obtained lawfully and voluntarily. The homicide detectives involved placed the petitioner's house under surveillance for several days prior to arresting the petitioner. The homicide detectives conceded that although there was plenty of time to obtain an arrest warrant, they chose not to secure one. *Furthermore, the homicide detectives acknowledged that it was their goal to arrest the petitioner in a manner so that he would be isolated and unable to request or have others on his behalf request the presence of an attorney prior to any questioning.*

The detectives conceded that they planned the warrantless arrest of the petitioner so they would be able to lawfully question the petitioner without being hampered by the presence of his attorney. In fact the petitioner was held by the detectives involved for more than 12 hours in an interrogation room which contained no means of communication with the outside world. The petitioner was incessantly questioned hour after hour by teams of detectives. Moreover, the petitioner testified that upon his arrival in the interrogation room, he was stripped naked and beaten by at least four detectives for over 20 minutes. Furthermore, the petitioner was deprived of food, sleep, and the use of a bathroom for the first 6 hours of this interrogation.

It is obvious that if detectives would go to these lengths in order to circumvent the petitioner's right to counsel, they would use any means possible to obtain a confession, whether voluntary or involuntary. The Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable search and seizures, shall not be violated, . . .[except] but upon probable cause." Certain limited seizures on less than probable cause have been permitted but they must be far less intrusive and of a narrower scope than an arrest. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. BrignoniPonce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); *People v. DeBour*, 40 N.Y.2d 210 (1976). The *Terry* case and its progeny have been held by the United States Supreme Court to be extremely circumscribed exceptions to the general rule requiring probable cause for any seizure of a person. *Dunaway v. New York*, 442 U.S. 200, 210, 99 S. Ct. 2248-2255, 60 L. Ed. 2d 824, 34 (1979), overruled the Court of Appeals decision in *People v. Morales*, 42 N.Y.2d 129 (1977), leaving in tact, at most, the only exception which exists to the necessity of having probable cause before questioning an individual, in depth, as to a crime; where a defendant voluntarily goes with the police.

One of the detectives involved was so brazen as to testify that the petitioner was so well known in the local law enforcement community that whenever a crime was committed, the petitioner was automatically deemed a suspect. We maintain that the calculated efforts on the part of the homicide detectives herein deprived the petitioner of his constitutional right to counsel and resulted in an involuntary confession to the crime of which he was convicted. We believe that the courts have an obligation to scrutinize

the facts of every case to prevent constitutional violations by "circuitous and indirect methods." See *Byars v. U.S.*, 273 U.S. 28 (1927). Significantly, District Judge Weinstein in his Memorandum decision conceded that the methods and tactics employed by the Detectives in order to secure these statements "are troubling" (M.16).[2]

The burden of proof to establish that a defendant's admission or confession was voluntarily made is upon the State. In determining this, if a defendant is interrogated and a statement is obtained without the presence of an attorney, the government has a heavy burden to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 437, 475 (1966). District Judge Weinstein opined that *"it would appear unlikely that petitioner, who had been arrested numerous times and had an attorney, would not ask for him a single time during his eight or more hour interrogation"* (M. 16).

A statement which is the product of the overbearing of the defendant's will is not voluntarily made. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 C. Ct. 2041 (1973). In determining voluntariness, the Court must consider all the facts and circumstances under which the statements were made, including the duration of the questioning and the educational background of the defendant. The involuntariness of an inculpatory statement may usually best be uncovered by looking at the "totality of the circumstances" under which it came about. *Clewis v. Texas*, 386 U.S. 707, 87 S. Ct. 1338 (1967); *Fikes v. Alabama*, 352 U.S. 191, 77 S. Ct. 281 (1956).

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[2] M - refers to Judge Weinstein's Memorandum and Order.

In appraising the "totality", in the case at bar, the circumstances here include the following:

1) That the more than 12 hours of detention without probable cause were continuous.

2) The interrogation room contained a table and chairs but no telephone or other means of outside communication. Petitioner's detention was confined to that 4' by 8' room usually populated with at least two homicide detectives.

3) Petitioner was constantly questioned, hour after hour, by teams of detectives.

4) Petitioner testified that upon his arrival at the homicide squad, he was stripped naked and beaten by at least four detectives for over twenty minutes. The police then informed him that he would be beaten every ½ hour.

5) Petitioner was deprived of food, sleep, and use of the bathroom for a period of at least the first six hours of interrogation.

6) At the time that petitioner relented and a videotaped confession was finally made, he had been interrogated continuously for over eight hours.

7) It was only after his videotape that appellant was allowed to use the bathroom, almost in the nature of a reward. See; *Davis v. North Carolina,* 384 U.S. 737 (1966).

8) During the whole night and morning of interrogation, petitioner was not allowed any food or drink, except coffee and donuts at about 1:30 A.M. after he reluctantly agreed to appear on the videotape.

9) The potential effect on human beings of the lack of such elemental needs as sleep and sustenance requires no elaboration. Case law repeatedly has emphasized the vital effect that the resultant "slowly mounting fatigue" may be expected to have on a person's judgment and will. See *Spano v. New York*, 360 U.S. 315 (1959) (no food during 12 hours of custody).

10) Petitioner was physically abused and beaten during the questioning. Without any letup, the interrogation of Hannigan continued for nine or ten hours. After the initial twenty minute beating, Hannigan was struck and hit numerous times during the night of questioning. The petitioner's repeated requests for counsel were ignored and he was told not to make any mention of an attorney during the videotape (H. 788, 802). The exhausting effect of such prolonged and persistent cross-questioning on the mental, emotional and physical state of its target is obvious. The result of the aforementioned unlawful conduct produced statements that were not voluntary and should have been permitted to be introduced at trial.

POINT FIVE

Photographic identifications were unfairly suggestive and unfair investigative methods were employed by police.

The New York Supreme Court permitted into evidence photographic identifications of the petitioner that were unfairly suggestive and unfairly inculpatory. The homicide detectives involved interviewed local residents regarding

the murder of the victim in an attempt to place the petitioner at the scene of the crime. The detectives would show the photograph of the petitioner and ask the individual they were interviewing whether they recognized the man in the picture. This procedure was employed during the interviewing of Walter Knoblich, a custodian of a local elementary school, which was located near the scene. Mr. Knoblich responded by stating "It might have been him.", referring to an individual he spoke to for about five minutes the morning of the crime. Prior to any identification the detectives had informed Mr. Knoblich that the individual in the photograph had been arrested and made an inculpatory statement. Mr. Knoblich was called as a witness at trial by the People and permitted to identify the appellant in Court as the individual he saw during the early morning of the day the crime was committed.

Equally as damning and unfair was the identification process employed during the interview of a store clerk named Marisol Toledo. The homicide detectives traveled to New York City to interview individuals near where the victims car was found abandoned. The detectives hoped to find a connection between the petitioner and the stolen car of the victim. The detective presented Miss Toledo with the photograph of the petitioner, whom she could not initially identify. The photograph was left with Miss Toledo to observe for approximately five minutes before she made a "positive" identification. Miss Toledo was called as a witness by the People and permitted to identify the petitioner at trial as the person she saw in her store at a time when the victim's car might have recently been abandoned.

A

No line-up identification was conducted despite time to do so.

Both of these "identifications" were made after a week had passed from the time they had allegedly viewed the petitioner. Moreover, both witnesses acknowledged viewing the individual that they claimed was the petitioner for several minutes. Neither witness had previously known or had met the petitioner. Despite the detectives having a full week to arrange a photo-spread or other identification procedure, they chose instead a more suggestive manner of simply showing the petitioner's picture by itself. The Court incorrectly ruled that since these identifying witnesses were not victims or observers of the crime itself, that therefore a different standard should be applied. The trial Court found that the detectives were merely " testing the Prosecutor's theory about how the crime was committed" and therefore a lesser standard of fairness should be applied.

The overly suggestive identification procedure employed by the detectives tainted the identifications that the witnesses made of the appellant and, therefore, the trial Court erred by permitting the in-Court identifications made by the witnesses.

Significantly, *Judge Weinstein in his Memorandum decision suggested that other Courts could have determined the identifications inadmissible* (M. 17). The United States Supreme Court has ruled that while single photographic arrays are not *per se* impermissible, their use must be scrutinized with care. See *Manson v. Brathwaite*, 432 U.S. 98 (1977).

In the case at bar, although the police had a full week to arrange a proper photo-spread or line-up, they chose not to do so. The process of displaying one photo when the police had sufficient time to arrange a proper photo-spread cannot be justified. Thus, the identification procedures herein employed were unduly suggestive under the totality of circumstances and consequently violative of due process. *Simmons v. United States*, 390 U.S. 377 (1968).

Based on the "totality of circumstances" analysis pursuant to the guidelines set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), the People failed in that burden as to the witnesses Knoblich and Toledo. *The opportunity to view*: Knoblich testified at the hearing that he had an innocuous five-minute conversation with a person about the weather. Toledo related how she sold an individual some item in her store, and the transaction took only minutes. The degree of attention: The quality of their observation was affected by both witnesses in that nothing unusual or memorable occurred. Knoblich discussed the weather, while Toledo made a quick sale of an item she could not even recall. *Accuracy of the description*: *Neither witnesses had given any previous descriptions, and both were told that the man in the photo was now under arrest. Witnesses' level of certainty*: both witnesses did not identify petitioner as the man in the photo right away. Knoblich wasn't sure, "Guess that's the man", while Toledo testified that the detectives left the photo on her counter for five minutes before she confirmed any identification (H. 356). Time between the crime and the confrontation: in both cases at least a week had passed.

The United States Supreme Court has stated: "It must be recognized that improper employment of photographs by

police may sometimes cause witnesses to err in identifying criminals . . . This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that the person committed the crime. Regardless of how the initial misidentification comes about, the witnesses thereafter is apt to retain in his memory the image of the photograph rather than that of the person actually seen, reducing the trustworthiness of subsequent line-up or courtroom identification." *Simmons v. United States*, 390 U.S. 377 (1968).

In this case, we have all the factors that the *Simmons* case warned against. Both witnesses were shown only one photo, both were encouraged to make a positive identification by the police, and both were bolstered in their pick by being informed that the man identified was now under arrest. The suggestive elements in these identifications made it all but inevitable that the witnesses would identify the petitioner whether or not he was in fact "the man". Clearly, allowing this type of damning evidence lead to the unfair conviction of the petitioner.

CONCLUSION

Based on the foregoing, the writ ought to be granted.

Dated: New York, New York
August 23rd, 2004

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-6519 (JBW)
03-MISC-0066 (JBW)

THOMAS HANNIGAN,

Petitioner,

against

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent.

JACK B. WEINSTEIN, *Senior District Judge*:

Petitioner was granted a hearing. He was present by telephone and by counsel. The petition for a writ of habeas corpus, 28 U.S.C. § 2254, is denied for the reasons stated orally on the record. This memorandum briefly addresses petitioner's claims.

I. Facts

On August 17, 1988, Judith Smith was murdered in her West Islip home. Petitioner, a known criminal who lived nearby, was immediately suspected by the police. *See* Respondent's Appellate Division Brief, at 2. The day after the crime, the victim's car, which had been taken at the time of the murder, was recovered in New York City. A clerk who worked in a store near where the car was found

recalled seeing petitioner in the store that day. Petitioner's fingerprints were found inside the car and his palm print was found outside a window at the victim's home. A sneaker print was also found inside the victim's house; the tread did not match any sneaker traced to petitioner.

Although the police believed that they had probable cause to arrest petitioner, they did not do so. Instead, they conducted a "stake-out" of petitioner's residence. The purpose of the "stake-out" was to arrest petitioner when he was alone so that petitioner's friends and family would not call an attorney. *See* Hearing Transcript ("Tr."), at 638-44. Petitioner, then twenty-two years old, was arrested and taken to the police station. Upon arrival, he was placed in an eight-foot by nine-foot interrogation room with as many as four police officers. *See id.* at 654. The interrogation began at approximately 8:00 p.m.; petitioner signed a confession at 10:48 p.m. The interrogation then continued until 1:30 a.m., when petitioner called his parents. At that time he was given some coffee and doughnuts. Petitioner altered his confession, stating that he had acted with an accomplice. At approximately 4:00 a.m., petitioner made a videotaped confession.

Petitioner was indicted on two counts of murder (intentional and depraved indifference murder) and one count of first degree burglary. The trial court conducted a lengthy pre-trial hearing to determine whether police had probable cause to arrest petitioner and whether the confessions and pre-trial identifications would be admissible at trial. In a written decision dated June 7, 1989, it held that the police did have probable cause, that the identifications were proper, that the confessions were not coerced, and that his right to an attorney was not violated.

Petitioner was convicted of both felony and intentional murder and first degree burglary. Evidence at trial demonstrated that the victim's car was ticketed at 45th Street in Manhattan on the day of the murder, and that petitioner was shopping at a store nearby. His fingerprints were found in the victim's car and outside a window at the Smith home. Petitioner's confessions were also introduced.

He was sentenced to serve concurrent twenty-five years to life prison terms for the two murder convictions. As a prior felon, he was to serve a consecutive term of twelve and one-half to twenty-five years for the burglary conviction.

In August 1992, petitioner appealed to the Appellate Division, Second Department. He made the following arguments: (1) the trial court erred in not suppressing the confessions on Fourth Amendment grounds; (2) the trial court erred on not suppressing the confessions on Sixth Amendment grounds; (3) the confessions should have been suppressed because they were involuntarily made; (4) the identification procedure was unduly suggestive; (5) petitioner was denied a fair trial because of prosecutorial misconduct; and (6) the evidence did not establish petitioner's guilt beyond a reasonable doubt. On February 3, 1993, petitioner filed a supplemental brief that contained a seventh claim—that the trial court erred by screening potential jurors in the presence of petitioner's trial counsel but outside the presence of petitioner and without petitioner having waived his appearance. The claim in the supplemental brief was based on *People v. Sloan*, 79 N.Y.2d 386 (N.Y. 1992), which was decided nearly three years after petitioner's conviction. In *Sloan*, the Court of Appeals reversed a conviction where the defendant was excluded

from a *voir dire* sidebar at which the trial judge asked jurors about their attitudes and feelings concerning the events and witnesses involved in the case.

The Appellate Division examined petitioner's supplemental claim concerning his exclusion from part of the *voir dire* in depth. *See People v. Hannigan*, 193 A.D.2d 8, 601 N.Y.S.2d 928 (N.Y. App. Div. 2d Dep't 1993). After considering *Sloan* and its progeny, the Appellate Division held that this doctrine was not applicable retroactively. With regard to petitioner's remaining contentions, the Appellate Division held that they were "unpreserved for appellate review or without merit." *Hannigan*, 193 A.D.2d at 14; 601 N.Y.S.2d at 932. Petitioner sought and obtained permission to appeal solely the *Sloan* question to the Court of Appeals. The Court of Appeals affirmed the decision of the Appellate Division without comment. *See People v. Hannigan*, 84 N.Y.S.2d 981, 622 N.Y.S.2d 905 (N.Y. 1994).

On May 6, 1997, petitioner filed a petition for a writ of habeas corpus in the Eastern District of New York. The petition was docketed as 97-CV-2717. By Memorandum and Order dated March 31, 1998, the judge dismissed the petition as not timely. Petitioner moved for reconsideration. On September 2, 1998, the parties agreed, with the consent of the court, to reinstate the petition and then immediately withdraw it without prejudice in order to permit petitioner to exhaust his state remedies.

In January 1999, petitioner filed a motion pursuant to New York Criminal Procedure Law section 440.10 to vacate the judgment of conviction. He alleged that his trial counsel was working under a conflict of interest because he was under investigation at the time he was representing petitioner. The trial court denied the motion. Petitioner

applied for leave to appeal to the Appellate Division; the application was denied in June 1999.

II. Habeas Corpus Claims

In September 1999, petitioner "reinstated" his original habeas corpus petition. Although the present petition is substantially identical to the petition submitted in 1997, it was filed under a new docket number, 99-CV-6519. He makes six arguments:

1) He was denied the effective assistance of counsel;
2) He was denied the right to be present during all material stages of his trial;
3) He was denied a fair trial because of prosecutorial misconduct;
4) His confession was involuntary and secured in violation of his right to counsel;
5) He was improperly identified at trial; and
6) His guilt was not proven beyond a reasonable doubt.

Respondent does not contest the fact that the petition is timely.

III. Law

A. Antiterrorism and Effective Death Penalty Act of 1996

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal habeas court owes substantial deference to the state court's decision. According to AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner on a claim that was "adjudicated on the merits" in state court only if it concludes that the adjudication of the claim "(1) resulted in a decision that was con-

trary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). An "adjudication on the merits" is a "substantive, rather than a procedural, resolution of a federal claim." *Sellan v. Kuhlman*, 261 F.3d 303, 313 (2d Cir. 2001) (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999)). Under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring and writing for the majority in this part). Under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[F]ederal law, as determined by the Supreme Court, may as much be a generalized standard that must be followed, as a bright-line rule designed to effectuate such a standard in a particular context." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002).

B. Exhaustion

Petitioner's ineffective assistance of counsel argument was raised in his section 440 motion. The motion was denied as was leave to appeal. Respondent concedes that this claim is exhausted. *See* Respondent's Memorandum of

Law ("Opposition Brief"), at 6. Petitioner raised grounds 2 through 6 on direct appeal to the Appellate Division. He only appealed the *Sloan* issue (ground 2) to the Court of Appeals, which affirmed. According to respondent, grounds 3 through 6 are unexhausted but procedurally barred.

Respondent is correct. Under AEDPA, claims may only be presented in a habeas corpus petition if they are exhausted. "This exclusion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The exhaustion requirement requires the petitioner to have presented to the state court "both the factual and legal premises of the claim he asserts in federal court." *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). The State has not waived the exhaustion requirement. Therefore claims 3 through 6 are unexhausted because they were never presented to the Court of Appeals.

It would be fruitless for this court to require petitioner to now present claims 3 though 6 to the Court of Appeals, because those claims are now procedurally barred. If a petitioner specifies only certain issues that he deems worthy of review in a letter seeking leave to appeal a conviction to the New York Court of Appeals, he will be deemed to have waived any remaining claims in the original appellate brief. *Grey v. Hoke*, 933 F.2d 117, 120 (2d Cir. 1991). New York procedural rules permit only one application to the Court of Appeals. *See* N.Y. Ct. R. § 500.10. Consequently, claims 3 through 6 are unexhausted but procedurally barred.

A federal habeas court may not review a state prisoner's federal claims if those claims were defaulted in state court pursuant to an independent and adequate state procedural rule, "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner provides no justification for his failure to include these claims in his application for leave to appeal to the Court of Appeals. Nor does anything in the record suggest that barring these claims on a procedural ground would result in a fundamental miscarriage of justice.

In the past, a state prisoner's federal habeas petition had to be dismissed if the prisoner did not exhaust available state remedies as to any of his federal claims. *See Rose v. Lundy*, 455 U.S. 509, 522 (1989). Pursuant to AEDPA, a district court may now, in its discretion, *deny* on the merits habeas petitions containing unexhausted claims—so-called "mixed petitions." *See* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.")

IV. Claims

A. Ineffective Assistance of Counsel

Petitioner claims that he was deprived of the effective assistance of counsel. In particular, he claims that his assigned attorney was under active investigation by a Special Prosecutor for the State of New York. A complaint was filed with the State of New York Grievance Committee of the Bar Association, but this complaint was ultimately dis-

missed. Petitioner speculates that counsel must have been "preoccupied and very concerned and distracted about his own vulnerability to possible prosecution." Petitioner's Memorandum in Support of Petition for Habeas Corpus ("Petitioner's Memorandum"), at 2. He claims that counsel "failed to interview potential defense witnesses [. . .] and vigorously and completely defend [him]." *Id.* at 6. Beyond this general statement, however, petitioner provides no examples of specific instances in which Mr. Wilutis's performance was deficient.

Petitioner's argument was considered and rejected by the trial court in a motion to vacate the judgment. The trial court's denial was affirmed by the Appellate Division. Petitioner argues that the trial court's decision was based upon erroneous information provided by trial counsel. The trial court accepted as true, claims petitioner, counsel's statement that his involvement with the Special Prosecutor ended roughly two years before petitioner's trial. For purposes of this Memorandum Order and Judgment, the court accepts, *arguendo*, petitioner's contention that counsel was under investigation at the time he was representing petitioner.

Ordinarily, in order to prevail on a Sixth Amendment claim, a petitioner must prove both that counsel's representation "fell below an objective standard of reasonableness" measured under "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different," *id.* at 694. *See also United States v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2002). A "reasonable probability" is "a probability sufficient to under-

mine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The standard has been expressed somewhat differently when a petitioner claims that counsel labored under a conflict of interest. The Court of Appeals for this Circuit has broadened the rule in one case so that, *per se*, "[a] defendant's Sixth Amendment right to effective assistance of counsel includes the right to representation by conflict-free counsel." *United States v. Schwarz*, 283 F.3d 76, 90 (2d Cir. 2002) (citation omitted). In a more limited statement, it has declared that a defendant's right to counsel is violated if his attorney in question has "(1) a potential conflict of interest that result[s] in prejudice to the defendant, or (2) an actual conflict of interest that adversely affect[s] the attorney's performance." *United States v. Perez*, 325 F.3d 115, 125 (2d Cir. 2003) (citation omitted).

An actual, as opposed to a potential, conflict of interest exists when "during the course of the representation, the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Schwarz*, 283 F.3d at 91 (quoting *Winkler v. Keane*, 7 F.3d 304, 307 (2d Cir. 1993)). In *Schwarz*, the Second Circuit Court of Appeals held that an actual conflict of interest existed where an attorney "had a strong personal interest in refraining from any conduct" which might be objectionable to the defendant's union which had retained the defendant's attorney. In the instant case, petitioner alleges that his trial attorney had an actual conflict of interest because he was required to serve as the prosecutor's adversary for the benefit of petitioner while at the same time attempting to "curry favor" with the prosecutor in the hope of obtaining a favorable resolution of the pending investigation in his own case. Petitioner's Memorandum, at 4.

The facts in the case at bare are substantially different from those in *Schwarz*. *Schwarz* turned on the fact that the attorney had directly contrary interests. First, Schwarz's defense strategy was to shift the blame to others, a strategy that conflicted with the union's interest in defending itself in a civil suit. Second, the attorney in *Schwarz* had a strong pecuniary interest in not doing anything that might disturb the union. In other words, mounting an effective defense of the defendant would *per se* conflict with the interests of the union that had retained the attorney.

There is no such direct conflict of interest in the instant case. There is no relation between defendant's trial for murder and the Special Prosecutor's investigation. Petitioner fails to explain how trial counsel's effective defense of his client would or could conflict with his self-interest in not being charged in the investigation. Unlike *Schwarz*, there is no *per se* conflict between defending petitioner and defending himself. Such a *per se* conflict would have existed if petitioner had been charged in the same investigation as his attorney. But that was not the case. The conflict of interest in the instant case, if there was any conflict of interest, was purely potential.

Given that the conflict of interest was merely potential, not actual, petitioner must show prejudice. *See United States v. Perez*, 325 F.3d 115, 125 (2d Cir. 2003). He fails to do so. Nothing in the habeas corpus petition itself or in Petitioner's Memorandum suggests any acts or omissions by counsel that prejudiced petitioner.

An examination of the full record indicates that counsel zealously represented his client and was effective during all stages of the trial. The substantial evidence against petitioner further undermines petitioner's argument that he was prejudiced by counsel's supposedly deficient perform-

ance. In any event, the state court's decision holding that no Sixth Amendment violation existed was not contrary to or an unreasonable application of clearly established federal law. *Cf. Price v. Vincent*, 123 S. Ct. 1848 (2003).

B. Exclusion from a Material Stage of the Trial

Petitioner's second contention is that he was excluded from a material stage of his trial. In particular, he alleges that he was excluded from *in camera* hearings in which the trial judge interviewed thirteen prospective jurors about what they had heard or read about the case in the media. Of these thirteen jurors, three were peremptorily challenged by the defense, and one was eventually chosen to sit on the jury as foreperson. *See People v. Hannigan*, 601 N.Y.S.2d 928, 929 n.2 (N.Y. App. Div. 2d Dep't 1993). Petitioner's counsel was present during the *in camera* hearings.

As noted *supra*, this claim was the subject of a lengthy Appellate Division decision that was subsequently affirmed by the New York Court of Appeals. *See id.; People v. Hannigan*, 84 N.Y.2d 981 (N.Y. 1994). Petitioner's argument in his habeas corpus petition is identical to the one that was rejected by the State's highest court. He argues that his exclusion from the *in camera* hearings violated two decisions after his conviction: *People v. Sloan*, 79 N.Y.2d 386 (N.Y. 1992) and *People v. Antommarchi*, 80 N.Y.2d 247 (N.Y. 1992).

Petitioner's argument lacks merit. Federal habeas corpus relief is only available for convictions obtained in violation of the Constitution or federal law. *See* 28 U.S.C. § 2254(a). Both cases cited by petitioner were decided on the basis of New York, not federal, law. *See People v. Hannigan*, 601 N.Y.S.2d 928, 930 (N.Y. App. Div. 2d Dep't 1993) ("It is crucial to note that the Court of Appeals, in *People v. Sloan*,

[. . .] cited [N.Y. Crim. Proc. Law § 260.20], its own cases, and New York Constitution, article I, § 6, as the bedrock of this 'fundamental right' [to be present during the court's side-bar *voir dire* of prospective jurors where the questions delved into attitudes and feelings concerning the case]"; *id.* at 931 ("*Antommarchi* was decided as a question of State law"). The New York Court of Appeals affirmed the Appellate Division's holding that both *Sloan* and *Antommarchi* applied only prospectively. Because both were decided after petitioner's jury selection (and conviction), neither is applicable to his case.

Petitioner claims that his exclusion from the *in camera voir dire* deprived him of equal protection and of due process of law. *See* Habeas Petition, at 3. His brief before the Appellate Division cites federal law only for the undisputed contention that a defendant has a right to be present at every critical or material stage of his trial. Petitioner does not cite any federal law with respect to exclusion from a jury *voir dire*. To the extent that petitioner is arguing that his federal equal protection rights were violated, this claim was not presented to state courts and is unexhausted.

Even if petitioner did present a federal claim to the state courts, nothing indicates that the decision of the New York Court of Appeals denying relief was contrary to or an unreasonable application of well-established federal law. Consequently, under AEDPA's deferential standard, the decision of the Court of Appeals must stand.

Moreover, while arguably the defendant should be physically at the sidebar where the discussion of challenges usually takes place, no harm was shown here. Petitioner was presumably present in the courtroom, available to make his views known to his counsel. No showing of any objection by petitioner is apparent from the record.

C. Prosecutorial Misconduct

Petitioner's third claim is that prosecutorial misconduct denied him his right to a fair trial. In particular, petitioner claims that the prosecutor intentionally violated the trial court's *Sandoval* ruling. The parties agreed that the prosecution could mention that petitioner had been previously convicted of a felony on more than one occasion. *See* Trial Tr. at 2-3. The trial court ordered that specific references to prior burglaries be redacted. *See id.* at 8-9. The court also ordered that no mention be made of the fact that petitioner was on parole. *See id.* at 10.

Petitioner points to a number of instances of alleged prosecutorial misconduct. During his opening, the prosecutor told the jury that petitioner had been asked by police: "We know you commit burglaries but why, why did you hurt somebody this time?" Trial Tr. at 571-72. Petitioner's counsel objected after the opening and moved for a mistrial, arguing that the statement was prejudicial because it led the jury to believe that he had been convicted of burglaries in the past. *See id.* at 576-77. The motion was denied. Petitioner also notes that several prosecution witnesses made reference to prior offenses. For example, Detective Henn testified that petitioner had said to the police, "I knew you guys were going to talk to me because of my past." *Id.* at 1075. Later, Detective Paladino stated that another detective had told petitioner during the interrogation, "Tom, I know you're just a burglar." *Id.* at 1217. Petitioner's counsel objected and the trial court immediately gave a curative instruction. *See id.* at 1218. Later, Detective Paladino was asked by the prosecutor what petitioner did with the money he made by selling the victim's jewelry. Detective Paladino answered that "[h]e said that he

bought some crack with the money on 43rd Street from a guy he was in jail with." *Id.* at 1234. Petitioner's counsel objected, and shortly thereafter the trial court gave the jury a curative instruction. *See id.* at 1247-48. Finally, petitioner objects to the fact that the prosecutor repeatedly mentioned that the victim was sexually abused despite the fact that petitioner was not charged with any sexual crimes. *See id.* at 2604-08. The prosecutor suggested that petitioner had tried to shift the blame to another so that he would not appear to be a "sexual pervert." *Id.* at 2608.

Ordinarily, a prosecutor's misconduct will require reversal of a state court conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair, and, therefore, a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). Nonetheless, "when the impropriety complained of effectively deprived the defendant of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair." *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990) (citing *DeChristoforo*, 416 U.S. at 643). Inquiry into the fundamental fairness of a trial requires an examination of the effect of any misconduct within the context of the entire proceedings. *DeChristoforo*, 416 U.S. at 643. In order to view any prosecutorial misconduct in context, "we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly could have tipped the scales in favor of the prosecution. . . . Ultimately, we must consider the probable effect the prosecutor's [statements] would have on the jury's ability to judge the evidence fairly." *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994) (quotations omitted).

Petitioner's claim lacks merit. An examination of the purported prosecutorial misconduct reveals that it falls short of the high threshold set forth in *DeChristoforo*. In many instances, the prejudicial information was furnished spontaneously by the witness in response to a non-objectionable question. In the cases where the prosecutor himself made the prejudicial statement, as in the opening and closing, the remarks were not of sufficient magnitude to render the trial fundamentally unfair. The court did attempt to limit the damage by curative instructions.

D. Improper Admission of Confessions

Petitioner claims the written and videotaped confessions were coerced. In particular, he claims that he was stripped naked, beaten, and not permitted to call his attorney despite his repeated requests. *See* Habeas Petition, at 6. He also claims that one of the police interrogators threatened to rip off his testicles with a pair of pliers. *See* Hearing Tr., at 806.

The pre-trial hearing at which the issue of coercion, *inter alia*, was raised, lasted seven days. Numerous witnesses were called by both the prosecutor and the defense. Petitioner himself testified. The transcript of the hearing runs nearly 1,000 pages. In a written Memorandum dated June 7, 1989 ("Pre-Trial Memorandum") included in Appellant's Appendix A1, appended to Petitioner's Court of Appeals Brief, the trial judge found that petitioner's confessions were not coerced. This finding was based on the fact that the judge did not find petitioner to be a credible witness. *See id.* at 6. The trial judge pointed out several instances in which the petitioner lied or contradicted earlier statements. For example, petitioner insisted that he did not plead guilty to a harassment charge three years earlier,

even when shown the official court records documenting the conviction. *See id.* at 6. Petitioner denied complaining that he was punched while lying on his stomach. In fact, he had made such a complaint earlier. Petitioner testified that the written statement he later signed had been prepared before he was questioned. However, the statement included specific details that the police could not have known about and which were subsequently confirmed by witnesses. *See id.* at 6.

Under AEDPA, factual determinations of the state court, such as whether a confession was coerced, are entitled to great deference. "[A] determination of factual issue made by a State court shall be presumed to be correct. The [petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In this case, petitioner is unable to prove clearly and convincingly that his confession was coerced or that he sought and was refused the assistance of an attorney.

There are, however, aspects of the interrogation that are troubling. Detective Cronin stated that petitioner was considered a suspect as soon as police arrived at the crime scene, despite the fact that nothing at that point linked petitioner to the crime. *See id.* at 629. He also admitted that police officers sought to arrest petitioner outside the presence of his parents so he could "make his own decisions" about whether or not to ask for an attorney. *Id.* at 642. It is not disputed that petitioner had been arrested numerous times, and that his attorney who had represented petitioner in ten or fifteen cases filed a letter with the police department indicating that petitioner was represented by him. *See* Hearing Tr., at 819-21. It would appear unlikely that petitioner, who had been arrested numerous

times and had an attorney, would not ask for him a single time during his eight or more hour interrogation. These facts are insufficient to overcome the deference owed to state court findings of fact. On this basis, this claim must be dismissed. While the state court decision that petitioner lacked credibility is well-supported by the record, there is a strong suspicion of a degree of coercion that should not be ignored.

E. Improper Admission of Identifications

Petitioner's next claim is that the trial court permitted into evidence photographic identifications of petitioner that were impermissibly suggestive and unfairly inculpatory. According to petitioner, "detectives should show [a photograph of petitioner] and ask the individual they were interviewing whether they recognized the man in the picture." Habeas Petition, at 7. Respondent concedes that this method was used, adding that the interviewees were not informed that the person in the picture was suspected of murder. Petitioner asserts that in the case of one interviewee, police stated, prior to the displaying the photograph, that the individual in the photograph had been arrested and had made an inculpatory statement. Petitioner claims that the other interviewee was only able to identify petitioner after police left the photograph with her for five minutes. Respondent's argument, which was accepted by the trial court, is that the identification procedure used in this case was used solely to confirm petitioner's identity rather than establish it. *See* Pre-Trial Memorandum, at 3. The trial court also noted that the witnesses were not involved in the crime and that their identifications were subject to "vigorous" cross-examination. *Id.* at 3.

While other courts might have found differently, the trial court's determination that the identifications were admissible is not contrary to, or an unreasonable application of, clearly-established federal law. Consequently, this claim lacks merit, though the practice used is troublesome.

F. Insufficiency of the Evidence

Petitioner's final claim is that the evidence presented to the jury was insufficient to find him guilty beyond a reasonable doubt. He points to the fact that the crime scene indicated that more than one person was involved in the murder, and that a sneaker print found at the crime scene did not match any of the petitioner's sneakers. *See* Habeas Petition, at 9.

The relevant question for this court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Petitioner "bears a very heavy burden" when challenging the legal sufficiency of the evidence in a state criminal conviction. *Einaugler v. Supreme Court*, 109 F.3d 836, 840 (2d Cir. 1997).

Petitioner is unable to overcome the burden set forth in *Einaugler*. Given the strong evidence in this case, including the confessions and fingerprint evidence, a reasonable jury could find petitioner guilty beyond a reasonable doubt of all charges. Consequently, this claim is dismissed.

V. Conclusion

This opinion complies with *Miranda v. Bennett*, 322 F.3d. 171, 175-77 (2d Cir. 2003), and Rule 52 of the Federal Rules of Civil Procedure. No other issue open to consider-

ation by this court has merit. *See Sumner v. Mata*, 449 U.S. 539, 548 (1981) ("a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit").

A certificate of appealability may be granted with respect to any one of petitioner's claims only if petitioner can make a substantial showing of the denial of a constitutional right. Although this court does not find that any of petitioner's claims are meritorious, several of them potentially raise significant constitutional questions. A certificate of appealability is therefore granted as to each of the claims made by petitioner except that of insufficiency of the evidence—*i.e.*, the exclusion from a material stage of the trial, selection of the jury; conflict of interest of the trial attorney and the resulting ineffective assistance; prosecutorial misconduct; improper admission of a confession; and improper admission of identifications.

Petitioner has a right to seek a further certificate of appealability from the Court of Appeals for the Second Circuit. *See* 28 U.S.C. § 2253; *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003).

SO ORDERED.

By: /s/ JACK B. WEINSTEIN
Jack B. Weinstein
Senior District Judge

Dated: 8/7, 2003
Brooklyn, NY

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-2612
Filed: April 5, 2004

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 5th day of April, two thousand and four.

PRESENT:

JOSÉ A. CABRANES
ROSEMARY S. POOLER
Circuit Judges
JANET C. HALL
*District Judge.**

* The Honorable Janet C. Hall, of the United States District Court for the District of Connecticut, sitting by designation.

THOMAS HANNIGAN,

Petitioner-Appellant,

v.

COMMISSIONER OF CORRECTIONAL SERVICES,

Respondent-Appellee.

APPEARING FOR APPELLANT: IRVING ANOLIK, New York, NY.

APPEARING FOR APPELLEE: MICHAEL J. MILLER, Assistant District Attorney

(Thomas J. Spota, District Attorney of Suffolk County, *on the brief*), District Attorney's Office for Suffolk County, Riverhead, NY.

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and hereby is AFFIRMED.

In October 1988, petitioner Thomas Hannigan was indicted for intentional murder, felony murder, and first degree burglary concerning the August 17, 1988 murder of Judith Smith in her Suffolk County, New York home. On

July 27, 1989, petitioner was convicted by a Suffolk County jury of all three counts, and the trial court sentenced him to serve concurrent terms of twenty-five years' to life imprisonment for the two murder convictions and a consecutive term of twelve and one-half to twenty-five years' imprisonment for the burglary conviction.

On direct appeal to the New York Supreme Court, Appellate Division, petitioner challenged his convictions on seven grounds, six of which the Appellate Division determined were "unpreserved for appellate review or without merit." *People v. Hannigan*, 193 A.D.2d 8, 14, 601 N.Y.S.2d 928, 932 (2d Dep't 1993). With regard to petitioner's final claim that, in light of *People v. Sloan*, 79 N.Y.2d 386 (N.Y. 1992), the trial court erred by screening potential jurors outside petitioner's presence and without petitioner's waiver of his presence, the Appellate Division held that *Sloan* was not applicable retroactively and therefore offered petitioner no relief. 193 A.D.2d at 13-14, 601 N.Y.S.2d at 932. Petitioner sought leave to appeal only the *Sloan* issue to the New York Court of Appeals, which granted permission to appeal and affirmed without comment the decision of the Appellate Division. *People v. Hannigan*, 84 N.Y.2d 981, 622 N.Y.S.2d 905 (1994).

In May 1997, petitioner sought habeas relief in the District Court below. Appellant Br. at 3; Appellee Br. at 3. Although the Court initially dismissed the petition as untimely, the Court, on petitioner's motion for reconsideration and upon agreement of the parties, reinstated the petition, permitting petitioner to immediately withdraw it without prejudice in order to exhaust his State remedies. Appellant Br. at 3; Appellee Br. at 3. Accordingly, and pursuant to New York Criminal Procedure Law

§ 440.10,** petitioner filed a motion in the New York Supreme Court, Suffolk County, to vacate the judgment of conviction, on the heretofore-unraised ground that he had been denied the effective assistance of counsel because his trial counsel had been working under a conflict of interest when he represented petitioner at the same time that counsel was under investigation by the State. Appellant Br. at 4; Appellee Br. at 3. The New York Supreme Court, Suffolk County, denied the motion, and the Appellate Division denied petitioner's application for leave to appeal. Appellant Br. at 4; Appellee Br. at 3-4.

In 1999, petitioner renewed his federal habeas petition, in which he raised six claims. Appellant Br. at 4; Appellee Br. at 4. By Memorandum Order and Judgment dated August 7, 2003, Judge Weinstein denied the petition but issued a certificate of appealability with regard to the following five claims:

(1) petitioner was denied the effective assistance of counsel based on the State's investigation of petitioner's trial counsel during counsel's representation of petitioner;

(2) petitioner was denied the right to be present during all material stages of his trial when he was not present for the screening of potential jurors outside petitioner's presence;

** That statute provides in relevant part:

> At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

N.Y. Crim. Pro. L. § 440.10(1)(h).

(3) petitioner was denied a fair trial because of prosecutorial misconduct;

(4) petitioner's confessions were the product of coercion and secured in violation of his right to counsel; and

(5) petitioner was improperly identified at trial.

See Hannigan v. Comm'r of Corr. Servs., No. 99-CV-6519, slip op. at 4-20 (E.D.N.Y. Aug. 7, 2003).

Having reviewed the record and considered the arguments of the parties, we agree with Judge Weinstein that petitioner's claims of prosecutorial misconduct, improper admission of confessions, and improper identification procedures, as well as the extent to which the juror screening claim asserts an equal protection violation, were not exhausted in State court and are now procedurally barred from review by a federal habeas court. *See id.* at 6-7. Because the District Court did not certify the procedural bar issue to us, we cannot reach the merits of these claims. *See El Rhagi v. Artuz*, 309 F.3d 103, 105-06 (2d Cir. 2002) (per curiam). Moreover, the District Court was clearly correct when it found the claims procedurally barred and, further, that petitioner failed to make the requisite showing of cause and prejudice to overcome the procedural bar. *See Hannigan*, No. 99-CV-6519, slip op. at 7.

With regard to petitioner's remaining claims—namely, ineffective assistance of counsel and the extent to which his juror screening claim asserts a due process violation—we conclude, for substantially the reasons articulated by Judge Weinstein in his Memorandum Order and Judgment of August 7, 2003, that the claims are without merit. *See id.* at 7-15.

Accordingly, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT

Roseann B. MacKechnie, Clerk of the Court

By: /s/ LUCILLE CARR
Lucille Carr